

Private Letter Ruling: Transferee of film credit is allowed the credit in the tax year in which the credit certificate was originally issued, regardless of the year of transfer.

September 6, 2007

Dear:

This is in response to your letter dated June 5, 2007, in which you request a Private Letter Ruling on behalf of COMPANY1. Review of your request for a Private Letter Ruling disclosed that all information described in paragraphs 1 through 8 of subsection (b) of 86 Ill. Adm. Code Section 1200.110 appears to be contained in your request. The Private Letter Ruling will bind the Department only with respect to COMPANY1 for the issue or issues presented in this ruling. Issuance of this ruling is conditioned upon the understanding that neither COMPANY1 nor a related taxpayer is currently under audit or involved in litigation concerning the issues that are the subject of this ruling request.

The facts and analysis as you have presented them are as follows:

The purpose of this letter is to request a private letter ruling from the Illinois Department of Revenue (the "ILDOR") in accordance with 2 Illinois Admin. Code Section 1200.110. COMPANY1, a STATE corporation ("COMPANY1") is seeking a ruling that 1) COMPANY1, under Section 213 of the Illinois Income Tax Act, is entitled to a credit against its Illinois Income Tax in the amount of \$498,380.21, which it purchased from COMPANY2, LLC, an Illinois limited liability company, pursuant to the Film Production Services Act, on March 2, 2007 and 2) that said tax credit in the amount of \$498,380.21 is not subject to recapture by the ILDOR.

In support thereof, COMPANY1 presents the following facts and analyses:

### **BACKGROUND**

COMPANY2, LLC, an Illinois limited liability company ("Production Company") was organized by COMPANY3, Inc., an Illinois corporation, in connection with various productions listed in Appendix A, and attached hereto. ("Productions") Principal photography commenced in the State of Illinois on the dates as stated in Appendix A. As a result of its qualified production and labor expenditures, Production Company earned a qualified tax credit under the Film Production Services Tax Credit Act (the "Film Credit Act", 35 ILCS 15/10) in the amount of \$498,380.21. The amount of said credit was set forth on the "Film Tax Credit Certificate", which was issued by the DCEO on March 2, 2007.

COMPANY1 is a STATE corporation that will have Illinois Income Tax liability in its taxable year ending December 31, 2007. On March 2, 2007, COMPANY1 purchased Production Company's tax credit in the amount of \$498,380.21 for \$458,509.79, under Section 213 of the Illinois Income Tax Act. COMPANY1 purchased the tax credit at a discount for the purpose of applying the credit against its Illinois State taxes imposed under subsections (a) and (b) of Section 201 of the Illinois Tax Act. A true and correct copy of the "Film Tax Credit Transfer Certificate" which was issued by the DCEO on March 2, 2007, is attached hereto as Appendix B.

## **RULING REQUESTED**

COMPANY1 is seeking a ruling that, under Section 213 of the Illinois Income Tax Act, it is entitled to use, without risk of recapture, a tax credit in the amount of \$498,380.21, which it purchased from Production Company on March 2, 2007.

## **DISCUSSION**

### **Overview of Credit**

Effective January 1, 2004, the Illinois Film Production Credit Act empowers the Department of Commerce and Economic Opportunity ("DCEO") to make awards of the tax credits for the purpose of, among other things, preserving and expanding the motion picture industry in Illinois and to promote and encourage the hiring of Illinois residents. Further, effective May 1, 2006, Senate Bill 2030, which made extensive changes to the existing Illinois Film Production Credit, empowers the DCEO to approve a transfer of the Credit, in accordance with rules adopted by DCEO.

Section 213 of the Illinois Income Tax Act provides, in part:

For tax years beginning on or after January 1, 2004, a taxpayer who has been awarded a tax credit under the Film Production Services Tax Credit Act is entitled to a credit against the taxes imposed under subsections (a) and (b) of Section 201 of this Act *in an amount determined by the Department of Commerce and Economic Opportunity under the Film Production Services Tax Credit Act.* . . .

A transfer of this credit may be made by the taxpayer earning the credit within one year after the credit is awarded in accordance with rules adopted by the Department of Commerce and Economic Opportunity.  
(emphasis added)

The DCEO has published proposed regulations implementing these provisions at 30 Ill. Reg. 15316 (September 29, 2006). The new regulations and amendments to existing regulations proposed in this rulemaking are not final or binding, and may be changed. However, as currently proposed, 14 Ill. Adm. Code Section 528.70 provides for a film production company that has received tentative approval for a credit for a particular production to file with the DCEO a request for a "tax credit certificate," which must include an itemized statement of the expenditures qualifying for the credit, documentation of those expenditures, and an attestation of the computations and documentation by an independent certified public accountant. Proposed 14 Ill. Adm. Code Section 528.71 provides that the DCEO shall review the application and the attached documentation, and only after such review and approval by the DCEO will a tax credit certificate be issued under proposed 14 Ill. Adm. Code Section 528.75. A transfer of the certificate may be made only with the prior approval of the DCEO under proposed 14 Ill. Adm. Code Section 528.85, which provides that the DCEO will issue a certificate of transfer to the transferee, documenting its entitlement to claim the amount

of credit transferred.

The ILDOR has promulgated a regulation at 86 Ill. Adm. Code Section 100.2185, which provides in subsection (a):

For taxable years beginning on or after January 1, 2004, a taxpayer awarded a credit under the Film Production Services Tax Act [35 ILCS 15] *is entitled to a credit against the taxes imposed under subsections (a) and (b) of IITA Section 201 in an amount determined by the Department of Commerce and Economic Opportunity (IITA Section 213).* The amount of the credit shall be the amount shown on the Final Film Tax Credit Certificate issued by the Department of Commerce and Economic Opportunity under 14 Ill. Adm. Code 528.80.

Amendments have not yet been proposed to make this section match the regulations proposed by the DCEO.

#### **APPLICATION OF LAW TO CORPORATION**

DCEO issued a Film Tax Certificate to Production Company on March 2, 2007. The issuance of such certificate certifies that Production Company has complied with all requirements of the Film Credit Act and the Film Credit Regulations (and proposed regulations) and that it is entitled to a Credit under the Film Credit Act in the amount shown on the certificate.

Simultaneous with the issuance of the credit to Production Company, DCEO acted upon the written request by Production Company to transfer its earned Film Tax Credit to COMPANY1. Thus on March 2, 2007, the DCEO issued a Film Tax Credit Transfer Certificate for the benefit of COMPANY1, pursuant to 14 Ill. Adm. Code Section 528.85, which specifically provides for the transfer of a Film Production Services Tax Credit. The issuance of such certificate certifies that Production Company has complied with all requirements of Section 528.85.

As stated in 86 Ill. Adm. Code Section 100.2185(a), a taxpayer is entitled to the credit determined by the DCEO, and the amount of the credit is the amount shown on the certificate issued by the DCEO. The regulations proposed by the DCEO provide that review and approval of the credit shall be made by the DCEO before the certificate is issued, and make no provision for review or amendment of a certificate after it is issued. Accordingly, although these existing and proposed regulations are subject to change, in their current form they make no provision for revoking or reducing the amount of credit after a certificate has been issued by the DCEO, or for revoking or reducing the amount of credit transferred to another party after the transfer has been approved and a new certificate issued by the DCEO.

As a result, COMPANY1 should be entitled to a credit against its Illinois Income Tax in the amount of \$498,380.21, without risk of recapture.

#### **CONCLUSION**

In light of the foregoing, Taxpayer respectfully requests an ILDOR Ruling that under Section 213 of the Illinois Income Tax Act, COMPANY1 is entitled to use, without risk of recapture, a tax credit in the amount of \$498,380.21, which it purchased from Production Company on March 2, 2007.

#### REQUIRED STATEMENTS

1. The tax periods at issue includes taxable year of COMPANY1 ending December 31, 2007.
2. No audit or litigation regarding this tax period or the issues presented is pending with the ILDOR
3. To the best of the knowledge of the taxpayer, the ILDOR has not previously ruled on the same or a similar issue for the taxpayer or a predecessor and neither COMPANY1 nor any representative has previously submitted the same or a similar issue to the ILDOR and withdrawn it before a letter ruling was issued.
4. Favorable and contrary authorities, if any, have been discussed above.

#### **Ruling of the Department**

Section 213 of the Illinois Income Tax Act (35 ILCS 5/213) provides, in part:

For tax years beginning on or after January 1, 2004, a taxpayer who has been awarded a tax credit under the Film Production Services Tax Credit Act is entitled to a credit against the taxes imposed under subsections (a) and (b) of Section 201 of this Act in an amount determined by the Department of Commerce and Economic Opportunity under the Film Production Services Tax Credit Act. If the taxpayer is a partnership or Subchapter S corporation, the credit is allowed to the partners or shareholders in accordance with the determination of income and distributive share of income under Sections 702 and 704 and Subchapter S of the Internal Revenue Code.

A transfer of this credit may be made by the taxpayer earning the credit within one year after the credit is awarded in accordance with rules adopted by the Department of Commerce and Economic Opportunity.

The Department, in cooperation with the Department of Commerce and Economic Opportunity, must prescribe rules to enforce and administer the provisions of this Section. This Section is exempt from the provisions of Section 250 of this Act.

The credit may not be carried back. If the amount of the credit exceeds the tax liability for the year, the excess may be carried forward and applied to the tax liability of the 5 taxable years following the excess credit year. The credit shall be applied to the earliest year for which there is a tax liability. If there are credits from more than one tax year that are available to offset a liability, the earlier credit shall be applied first. In no event shall a credit under this Section reduce the taxpayer's liability to less than zero.

The provision regarding transfer of the credit was added by Public Act 94-171, effective July 11, 2005.

In 31 Ill. Reg. 2253, effective January 18, 2007, the Department of Commerce and Economic Opportunity has repealed 14 Ill. Adm. Code Section 528.80, which had provided for the issuance of a final credit certificate to a taxpayer entitled to a credit under Section 213 of the Illinois Income Tax Act, and adopted 14 Ill. Adm. Code Section 528.70 to provide, in part:

The applicant may request a tax credit certificate from the Department certifying the actual amount of the credit awarded to the applicant at any time following the completion of the accredited production, but in no event later than 2 years following the completion of the production. In a case where a single application was filed for two or more productions, a single tax credit certificate may, at the request of the applicant, be issued for more than one production. The tax credit will be issued upon the Department's verification of all costs submitted as qualifying as the applicant's Illinois labor expenditures and verification that the applicant has met or made good-faith efforts in achieving the goals of the diversity plan included with its application as described in Section 528.20 of this Part.

At the same time, the Department of Commerce and Economic Opportunity adopted 14 Ill. Adm. Code Section 528.85 to provide guidance on transfers of the credit. That section states:

- a) *A transfer of the credit may be made by the applicant earning the credit within one year after the credit is awarded in accordance with rules adopted by the Department of Commerce and Economic Opportunity. (Section 213 of the Illinois Income Tax Act; see Public Act 94-0171)*
- b) For purposes of this provision, a tax credit is earned on the date that the tax credit certificate is issued under Section 528.70 of this Part.
- c) Tax credits earned by an applicant in a taxable year ending prior to July 11, 2005 (the effective date of Public Act 94-0171) may not be transferred.
- d) For purposes of this Section, a tax credit earned by a partnership or Subchapter S corporation shall be treated as having been earned by its partners in the amounts determined under 86 Ill. Adm. Code 100.2185(c).
- e) Transfer of a tax credit shall be made as follows:
  - 1) The applicant earning the credit shall request the transfer from the Department, in writing, identifying the transferees (name, tax identification number, mailing address) and the amount to be transferred to each transferee, and the applicant shall return the tax credit certificate to the Department, together with its transfer request. The applicant is allowed to transfer or allocate a single credit to no more than 10 transferees.
  - 2) A request for transfer may be submitted with the applicant's request for the tax credit certificate under Section 528.70 of this Part, in which case the Department

may issue the requested certificates of transfer in lieu of the tax credit certificate.

- 3) If the transfer request is timely and meets the requirements of this Section, the Department shall issue a certificate of transfer to each transferee, identifying the original tax credit certificate and stating the amount of the credit transferred.
- 4) If the applicant earning the credit transfers less than the full amount of the credit, the Department shall issue a certificate of transfer to the applicant identifying the original tax credit certificate and stating the amount of tax credit retained by the applicant.
- 5) If the person transferring the credit is a partner or shareholder in a partnership or Subchapter S corporation that earned the credit, that person shall submit to the Department, in lieu of the original tax credit certificate, copies of the tax credit certificates and copies of the Schedule K-1-P received by that person from the partnership or Subchapter S corporation stating that person's share of the credit.

The Department of Revenue has adopted 86 Ill. Adm. Code Section 100.2185, which provides in part:

- a) For taxable years beginning on or after January 1, 2004, a taxpayer awarded a credit under the Film Production Services Tax Act [35 ILCS 15] is entitled to a credit against the taxes imposed under subsections (a) and (b) of IITA Section 201 in an amount determined by the Department of Commerce and Economic Opportunity (IITA Section 213). The amount of the credit shall be the amount shown on the Final Film Tax Credit Certificate issued by the Department of Commerce and Economic Opportunity under 14 Ill. Adm. Code 528.80.
- b) Year in which Credit is Taken. The credit allowed under this Section shall be taken in the taxable year in which the Final Film Tax Credit Certificate is issued by the Department of Commerce and Economic Opportunity under 14 Ill. Adm. Code 528.80. (emphasis added)

This regulation has not been amended to reflect the amendment in Public Act 94-171 to Section 213 of the Illinois Income Tax Act, providing for transfer of the credit, or to reflect the amendments to the regulations adopted by the Department of Commerce and Economic Opportunity, repealing 14 Ill. Adm. Code Section 528.80 and adopting 14 Ill. Adm. Code Sections 528.70 and 528.85. However, the emphasized language reflects the basic procedures that were in effect when it was adopted, and which remain in effect today after the enactment of Public Act 94-171 and the adoption of 14 Ill. Adm. Code Sections 528.70 and 528.85. Under those procedures, the Department of Commerce and Economic Opportunity conducts the appropriate review of the claim for credit and issues a certificate stating the amount of the credit awarded. The regulations provide for no subsequent review, adjustment or recapture of the credit, but rather state that the credit allowed is the amount awarded by the Department of Commerce and Economic Opportunity.

Under 14 Ill. Adm. Code Section 528.85, this procedure also applies to the transfer of a credit. The transfer is allowed only as approved by the Department of Commerce and Economic Opportunity and in the amount shown in the certificate of transfer, which in turn is based on a prior review of the claim

for credit. No provision is made for subsequent review, adjustment or recapture of the credit transferred.

Accordingly, as the transferee shown in the certificate of transfer copied in Appendix B, COMPANY1 is entitled to claim in its taxable year that includes the March 2, 2007, date on the certificate a credit equal to the \$498,390.21 amount shown on the certificate. The credit may not exceed COMPANY1's tax liability for that year, but any credit in excess of the liability may be carried forward up to 5 years.

The facts upon which this ruling are based are subject to review by the Department during the course of any audit, investigation or hearing and this ruling shall bind the Department only if the material facts as recited in this ruling are correct and complete. This ruling will cease to bind the Department if there is a pertinent change in statutory law, case law, rules or in the material facts recited in this ruling. Pursuant to 2 Ill. Admin. Code Section 1200.110(e), this ruling is automatically revoked as of ten years after the date of issuance, if not revoked earlier.

Very truly yours,

Terry D. Charlton  
Chairman, Private Letter Ruling Committee